ETHICS OPINION

RO-2007-03

TEMPORARY LAWYERS

QUESTION(S):

Under what conditions may a law firm employ a temporary lawyer? May a staffing agency act as a recruiter or agent ("agency" or "placement agency") to assist law firms and sole practitioners in locating and hiring qualified temporary or contract lawyers?

ANSWER:

Law firms may utilize the services of a temporary lawyer and a lawyer may participate in an arrangement with a temporary attorney staffing agency so long as: (1) the temporary lawyer and hiring law firm comply with all applicable conflict of interest requirements; (2) the temporary lawyer safeguards all confidential client information; (3) the client is informed that a temporary lawyer will be or has been hired to work on their case and the client consents; (4) the staffing agency and temporary lawyer do not split legal fees; and (5) the temporary lawyer and hiring law firm abide by all other provisions of the Alabama Rules of Professional Conduct.

DISCUSSION:

In researching this issue, it appears to the Disciplinary Commission that every state or national ethics organization, including the ABA, that has addressed the issue of temporary lawyers and temporary lawyer staffing agencies has authorized their use by law firms. However, in authorizing their use, each organization has done so under varying restrictions and conditions.[1] While generally approving the use of temporary

[1] See Alaska Bar Ass'n Ethics Op. 96-1 (1996); Colorado Bar Ass'n Ethics Op. 105 (1999); Supreme Court of Georgia Ops. 05-9(2006); Supreme Court of Texas Professional Ethics Committee Op. 515 (1996); California State Bar Ethics Op. 1992-126 (1992); Supreme Court of Ohio, Bd. Of Commissioners of Grievances & Discipline Op. 90-23 (1990); New Jersey Supreme Court Advisory Committee on Professional Ethics Op. 632 (1989); Oliver v. Bd. of Governors, Kentucky Bar Ass'n., 779 S.W.2d 212 (Ky. 1989); City of New York Bar Ass'n Formal Op. 1989-2 (1989); Florida State Bar Ass'n Op. 88-12 (1988); Virginia State Bar Ethics Op. 1712 (1998); Wisconsin State Bar Ethics Op. 96-4 (1996); New Hampshire Bar Ass'n Op. 1995-96/3 (1995); ABA Formal Op. 88-356 (1988).

lawyers and staffing agencies, the Disciplinary Commission finds it necessary to place its own restrictions and conditions on the practice. As such, this opinion attempts to address certain ethical issues facing the temporary lawyer, the hiring law firm, and the temporary lawyer staffing agency. While this opinion addresses some of the more pressing ethical dilemmas surrounding the use of temporary lawyers, it is by no means meant to be an exhaustive analysis of the ethical considerations surrounding the placement and hiring of temporary lawyers. Under any arrangement, both the temporary lawyer and hiring law firm must abide by all ethical duties arising under the Alabama Rules of Professional Conduct, including the duty to provide competent representation under Rule 1.1, Ala. R. Prof. C. With that caveat in mind, the Disciplinary Commissions addresses below certain key ethical issues raised by the placement and hiring of temporary lawyers.

CONFLICTS OF INTEREST

The most daunting ethical dilemma that will be faced by temporary lawyers and those firms that hire them will be determining whether a conflict of interest exists. For the purpose of determining whether a conflict of interest exists, a temporary lawyer who performs work for a client, even under the sole direction of the hiring law firm, represents that client. In other words, even if the temporary lawyer never meets or speaks with the client and all directions are issued by the hiring law firm, an attorney/client relationship is still formed between the temporary lawyer and the firm's client. As such, the temporary lawyer and hiring law firm must abide by Rules 1.7 and 1.9, Ala. R. Prof. C., regarding conflicts of interest involving current and former clients.

The more difficult question that is raised in regards to temporary lawyers and resulting conflicts of interests involves Rule 1.10, Ala. R. Prof. C., which provides as follows:

> RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE
>
> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.
>
> (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.
>
> (c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

The ethical dilemma posed by Rule 1.10 was aptly described in Hazard & Hodes, The Law of Lawyering, § 57.3, 4. 3rd Edition (2005):

> The question then arises how these lawyers should stand vis-à-vis the firms employing them. Are they closely enough affiliated with the firm so that imputed disqualification (in both directions) will apply during the time they are on staff? Plainly, a "temp" lawyer who has formerly represented a particular client (whether or not as a law temp) cannot personally oppose that client in a substantially related matter, no matter what the practice setting . . . But would it be permissible for that lawyer to work for a firm as a law temp on matters not involving that client while permanent members of the firm (perhaps in the next room) either initiate or continue litigation against the law temp's former client?
> The fundamental question then becomes when, for the purposes of Rule 1.10, is a temporary lawyer considered a member or associate of the hiring law firm?

The ABA and others have embraced the functional analysis test for temporary lawyers in ABA Op. 88-356, holding that:

> Ultimately, whether a temporary lawyer is treated as being 'associated with a firm' while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm.

The primary tenet of the functional analysis test is that the temporary lawyer may be screened from other matters while working for the hiring law firm and thus, avoid imputed disqualification. However, the effectiveness of using screens or "Chinese walls" has been questioned in recent years by several other jurisdictions. In fact, in RO 2002-01, we rejected the use of "Chinese walls" and determined that non-lawyer employees who change law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. Similarly, the Disciplinary Commission sees no reason to differentiate between temporary lawyers and full-time lawyers. As such, for the purposes of Rule 1.10 and determining whether a conflict of interest exists, a temporary lawyer will be treated as a member or associate of the firm while employed by the firm.

CONFIDENTIALITY

Under Rule 1.6, Ala. R. Prof. C., a lawyer has a duty to preserve the confidences and secrets of a client. It is the responsibility of the temporary lawyer to abide by Rule 1.6 by observing strict confidentiality regarding any confidences or secrets gained in the course of temporary employment. Absent client consent, a temporary lawyer may not reveal the subject matter and/or content of the services provided to clients of the hiring law firm to the staffing agency. Moreover, the temporary lawyer should not disclose any confidential information to the staffing agency in any time records submitted to the staffing agency. *See* Virginia State Bar Opinion 1712 (Op. in footnote 1).

NOTICE TO CLIENT

In determining whether the client must be informed and consent to the use of a temporary lawyer, many ethics orginizations have drawn distinctions between whether the temporary lawyer works on a client's case under the direct supervision of the hiring law firm. For instance, the ABA held in Formal Opinion 88-356, that if the temporary attorney will work under the direct supervision of a lawyer associated with the firm, the law firm is not required to disclose to the client that a temporary attorney is working on the client's case. In support of its position, the ABA stated that "[a] client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel ... is inherent in the act of retaining the firm." ABA Op. 88-356 at 10. According to this Opinion, use of a temporary attorney that will be closely supervised by a firm lawyer is akin to the use of firm personnel and does not require the consent of the client. If the temporary lawyer will not be closely supervised, but will work independently of the firm, then the client will need to be informed and his consent obtained for the use of the temporary attorney.

However, in Formal Opinion 05-9, the Georgia State Bar rejected such distinctions and adroitly observed that "[a] client reasonably assumes that only attorneys within the firm are doing work on that client's case, and thus, a client should be informed that the firm is using temporary attorneys to do the client's work." The Disciplinary Commission agrees with the Georgia State Bar and believes that a lawyer has a duty under Rule 1.3, Ala. R. Prof. C., to inform the client of the law firm's intention — whether at the commencement or at a later point in the course of representation – to use a temporary lawyer's services on the client's case. The client should always be given the option of either consenting to or rejecting the use of the temporary lawyer. Additionally, if the law firm wishes to pass the agency placement fee on to the client, the fee should be separately identified when billed to the client.

If the law firm intends on passing the costs of the temporary lawyer along to the client, the client must be so informed and consent to the fee arrangement. Any charge for the services of a temporary lawyer is subject to Rule 1.5, Ala. R. Prof. C., and therefore, must be reasonable. If the cost of the staffing agency is to be passed along to the client, the expense must be clearly communicated to the client and approved by the client at the outset of representation or when the hiring of a temporary lawyer from a staffing agency is first contemplated. Clearly, a payment to a staffing agency for the services of

a temporary lawyer is not among those expenses that ordinarily could be anticipated by a client. As such, the hiring law firm may only pass along the cost of the staffing agency to the client if the client has consented to the expense.

FEES

Regardless of whether a staffing agency is solely owned by an attorney or non-attorney, legal fees should not be split between the agency and the temporary attorney. For example, if non-attorneys have any ownership interest in the staffing agency, any splitting of legal fees would be in violation of Rule 5.4, Ala. R. Prof. C., which forbids a lawyer or law firm from sharing legal fees with a non-lawyer. Likewise, even if the staffing agency is solely owned by an attorney, the splitting of legal fees would still be inappropriate. While Rule 5.4 would not apply to a lawyer-owned staffing agency, the practical effect of splitting legal fees between the agency and the temporary lawyer would be to create a de facto law firm. The creation of a de facto law firm would lead to further problems involving Rule 1.10 and conflicts of interest. As such, the Disciplinary Commission has determined that regardless of ownership, legal fees should never be split between the staffing agency and lawyer.

Of course, this prohibition leads one to ask when is a payment to a staffing agency considered the splitting of a legal fee. One often used payment option involves the hiring law firm paying the staffing agency a certain amount per hour for the services of the temporary lawyer. The staffing agency then pays a portion of that amount to the temporary lawyer. In practical terms, the temporary lawyer is on the payroll of the staffing agency, not the law firm. Such a payment arrangement certainly suggests that a legal fee is being split between the staffing agency and the temporary lawyer.

As such, the Disciplinary Commissions believes that the better practice would be for the hiring firm to pay the temporary lawyer directly and then pay a separate placement/administrative fee to the staffing agency for locating and placing the temporary lawyer with the requesting law firm. The ABA has approved "an arrangement whereby a law firm pays to a temporary lawyer compensation in a fixed dollar amount or at an hourly rate and pays a placement agency a fee based upon a percentage of the lawyer's compensation,. . ." ABA Op. 88-356. Any fee for the location and placement of the temporary lawyer, however, could still be tied to the number of hours of work performed by the temporary lawyer on behalf of the hiring law firm.

JWM/s

5/18/07